

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
CHARLES W. AND DARLA)
R. KELLOGG,)
Appellants,)
v.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Respondent.)

PCHB No. 694

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

THIS MATTER being an appeal of a denial of an application for a permit to appropriate and use surface water; having come on regularly for hearing before the Pollution Control Hearings Board on the 12th day of December, 1974, at Vancouver, Washington; and appellants, Charles W. and Darla R. Kellogg, represented by Charles Kellogg, appeared pro se and respondent, State of Washington, Department of Ecology, appearing through Wick Dufford, Assistant Attorney General; and present at the hearing being David Akana, presiding officer and the Board having read the transcript, examined exhibits, considered the contentions of the parties,

1 records and files herein and having entered on the 7th day of March,
2 1975, its proposed Findings of Fact, Conclusions of Law and Order, and
3 the Board having served said proposed Findings, Conclusions and Order
4 upon all parties herein by certified mail, return receipt requested
5 and twenty days having elapsed from said service; and

6 The Board having received no exceptions to said proposed Findings,
7 Conclusions and Order; and the Board being fully advised in the premises;
8 now therefore,

9 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said proposed
10 Findings of Fact, Conclusions of Law and Order, dated the 7th day of
11 March, 1975, and incorporated by this reference herein and attached
12 hereto as Exhibit A, are adopted and hereby entered as the Board's
13 Final Findings of Fact, Conclusions of Law and Order herein.

14 DONE at Lacey, Washington, this 4th day of April, 1975.

15 POLLUTION CONTROL HEARINGS BOARD

16 
17 _____
18 CHRIS SMITH, Chairman

19 
20 _____
21 W. A. GISSBERG, Member

22 
23 _____
24 WALT WOODWARD, Member

25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
CHARLES W. and DARLA R. KELLOGG, JR.,

Appellants,

vs.

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB NO. 694

APPELLANTS' EXCEPTIONS TO
PROPOSED FINDINGS OF FACT,
CONCLUSIONS AND ORDER.

Appellants Charles W. and Darla R. Kellogg, Jr., make the following exceptions to the proposed Findings of Fact, Conclusions and Order:

1. The proposed denial of the water permit application is grossly unfair and discriminatory. The proposal is based solely upon the Fish and Game Department's stated closure of Salmon Creek drainage area in 1950. That stated closure has been ruptured at least eight times since 1950 and the water management program has admittedly been unevenly applied. Why shouldn't we be allowed use of water like those eight other people?

2. No representative of the Fish and Game Department has been on our property. Their claim for closure is based on a theoretical formula as to what would harm the fish, but their own fisheries biologist testified that .02 cfs withdrawal would not significantly affect the summer flow of water in Salmon Creek. In view of that testimony how can it be said that the withdrawal of any water would be harmful?

3. The water is available, our proposed use is beneficial, a denial of our application is admittedly unfair and discriminatory in view of the eight prior permits allowed. Why must we be the guinea pigs? We request reversal of the Department's order and the issuance of a permit for the water.

Dated this 7 day of April, 1975.

CHARLES W. AND DARLA R. KELLOGG, JR.

By

CW Kellogg
Appellants

cc: Wick Dufford
Asst. Atty. Gen.

RECEIVED

APR 7 1975

Pollution Control Hearings Board

By *Colonies Island*

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
CHARLES W. AND DARLA)
R. KELLOGG,)
Appellants,)
v.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Respondent.)

PCHB No. 694

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a denial of an application for a permit to appropriate and use surface water, came before the Pollution Control Hearings Board, David Akana, presiding officer, at an informal hearing in Vancouver, Washington at 10:00 a.m. on December 12, 1974.

Appellants, represented by Charles Kellogg, appeared pro se. Respondent appeared by and through Wick Dufford, Assistant Attorney General. Jennie Roland, Olympia court reporter, recorded the proceedings.

EXHIBIT A

1 Witnesses were sworn and testified. Exhibits were admitted.

2 From the testimony read, exhibits examined, and the contentions
3 of the parties considered, the Pollution Control Hearings Board makes
4 these

5 FINDINGS OF FACT

6 I.

7 This matter has been before the Board at a prior time in Charles
8 W. Kellogg, Jr. et ux v. Department of Ecology, PCHB No. 301 (August 7,
9 1973). The prior Findings accurately describe the background of this
10 matter and are hereby incorporated by reference and made a part of this
11 Order. This second appeal stems from a re-examination by the Department
12 of Ecology of the water available in an unnamed tributary to Salmon
13 Creek pursuant to our previous Order in PCHB No. 301 and the Department
14 second denial of the appellant's application.

15 II.

16 At the outset of this hearing, the Department conceded that the
17 appellant may appropriate surface water for stock watering purposes
18 without a permit. The remaining issue then is, as before, whether any
19 water is available for irrigation purposes upon the appellant's land.

20 III.

21 Appellant, Kellogg (who also represents his wife herein), is in
22 the construction business. In his spare time and on weekends, he raises
23 cattle and cultivates feed, notably oats and clover. He presently
24 irrigates 8 acres of land and is preparing 4 more acres. He ultimately
25 seeks to cultivate 40 acres of his property and thereby increase his
26 25 head herd of cattle to 60 head.

27 FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

IV.

When the appellant purchased his property in 1970, a very old 3 horsepower pump together with a piping system was appurtenant thereto. Appellant estimated, and his statement was uncontroverted, that approximately 20 acres had previously been irrigated and farmed before the farm was abandoned at some unknown earlier date, but perhaps in 1965. Facilities for raising horses and cattle were found on the property suggesting that the former use of the property was, at least, not different from the appellant's present and intended use. Relying upon the above indicia, appellant believed that he could re-establish farming operations.

V.

Appellant needs the surface water because no other water source is apparently available on or under his property. The appropriation of surface waters would enable him to grow alfalfa, hay and other feed crops at a more productive rate than he otherwise could. The location of appellant's property, at the 1500 foot elevation, results in a shorter growing season than normal and therefore a need for irrigation during those times in order to maximize, insofar as possible, the crop yield. Appellant, if denied this application, would not be able to make his farm a self-sufficient one. He would be forced to purchase feed commercially, at a price approximately four times that at which he could grow it.

VI.

The Department of Ecology, in its investigation, determined that 0.10 cubic feet per second (cfs) of surface water was available for

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 appropriation subject to any requirements by the Department of Fisheries.
2 This amount of water would normally irrigate only ten acres of land.
3 The Department of Ecology's estimate was based upon an inspector's
4 visit in September of 1971 and a study of appellant's photo in April
5 of 1973. Appellant has determined that he could be satisfied with
6 0.4 cfs of water rather than the 0.8 cfs originally requested.

7 VII.

8 The predecessor of the Department of Ecology, by honoring a
9 Department of Fisheries request, has considered Salmon Creek closed
10 since 1950. Notwithstanding this closure, the Department of Ecology's
11 predecessor issued eight surface water permits authorizing the
12 appropriation of water from Salmon Creek. The Department of Ecology,
13 as the succeeding agency, has not issued any permits allowing the
14 appropriation of water.

15 VIII.

16 The Department of Fisheries did not visit appellant's property in
17 making its determinations. Pertinent data was obtained from Salmon
18 Creek rather than tributaries such as those found on appellant's property.
19 No fish live in these tributaries. However, there is a significant
20 number of fish (coho and steelhead) in Salmon Creek.

21 IX.

22 The Department of Fisheries determined that no water was available
23 from the Salmon Creek tributary by a theoretical formula, which formula
24 ignored the historical flow data. Because the actual stream condition
25 was less than the ideal situation (17 cfs), this formed one basis for
26 recommending the denial of the application. The actual summer flows are

27 FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 less than 17 cfs. However, it was independently determined that the low
2 flow in the summer months are critical to fish survival. When the
3 appellant most needed his water, i.e., during the dry summer months,
4 the fish would also have the maximum need for water. Appropriating
5 water at this time would adversely affect the fish population in the
6 stream. Inasmuch as the Department of Ecology has determined the
7 amount of water available and the appellant has not seriously
8 challenged this determination nor that of the Department of Fisheries,
9 he has failed to show that the respective departments have erred.

10 X.

11 Any Conclusion of Law which should be deemed a Finding of Fact is
12 hereby adopted as such.

13 From these Findings the Pollution Control Hearings Board comes to
14 these

15 CONCLUSIONS OF LAW

16 I.

17 The evidence shows and the respondent agrees that the overall water
18 management program has been unevenly applied since 1950. However,
19 notwithstanding this apparent inequity, the Department of Ecology should
20 not be forever bound by the alleged indiscretions of its predecessor.
21 Moreover, the Department of Ecology did not participate in any of the
22 acts of which the appellant complains.

23 II.

24 Although water is available (0.1 cfs), and the raising of livestock
25 and the farming operations intended by the appellant are beneficial uses
26 of water (RCW 90.54.020), the appropriation of any water from the

27 FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 tributaries to Salmon Creek would result in lowering the flow of water
2 necessary to adequately support food and game fish population in
3 Salmon Creek. This removal of water could be detrimental to the public
4 interest. Accordingly, the Department of Ecology has properly denied
5 the application in accordance with RCW 90.03.290.

6 III.

7 Any Finding of Fact which should be deemed a Conclusion of Law
8 is hereby adopted as such.

9 From these Conclusions, the Pollution Control Hearings Board
10 enters this

11 ORDER

12 The Department of Ecology Order denying Application No. 23585, is
13 affirmed.

14 DONE at Lacey, Washington this 7th day of March, 1975.

15 POLLUTION CONTROL HEARINGS BOARD

16 Chris Smith
17 CHRIS SMITH, Chairman

18 W. A. Gissberg
19 W. A. GISSBERG, Member

20 Walt Woodward
21 WALT WOODWARD, Member

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26 FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER